FALCONBRIDGE'S CONTRIBUTION TO THE CONFLICT OF LAWS

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An Englishman writing in a Canadian law review, on an occasion which is a source of pride to Canadian lawyers, might appear at first sight like a stranger at a family reunion—welcome, but out of place. But Falconbridge's fame as an expert in the Conflict of Laws extends far beyond the confines of Canada. So perhaps it is fitting that one who is not a Canadian should attempt to describe his contributions to the subject; he can at any rate claim to be impartial. Of course, only an interim report can be here presented, for Falconbridge's distinguished career as a writer is by no means at an end.

So far as I can discover, his earliest contribution to the conflict of laws was an article on Marriage with Deceased Wife's Sister which appeared in the Canadian Law Times in 1908. Not having been born at the time, I cannot say what impression this article made on contemporary opinion; so I pass to the first of his major articles to be subsequently collected in his *Essays*. This article (on renvoi) was published in 1930,[1] and it will be convenient to consider it together with Falconbridge's later contributions to that subject.

II. *Renvoi*

The problem of renvoi is one of the most celebrated and difficult in the whole field of the conflict of laws. Its nature is usually illustrated as follows. A British subject of English domicile of origin

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[1] Renvoi and Succession to Movables (1930), 46 L.Q. Rev. 465; (1931), 47 L. Q. Rev. 271; reprinted as chapter 7 of Essays on the Conflict of Laws (1st ed.) (this book is henceforth cited simply as "Essays").

dies intestate domiciled in Italy. He leaves movables in England. According to the English rule of the conflict of laws, succession to movables is governed by the law of the intestate's domicile at the date of his death, that is, in this case by Italian law. But, according to the Italian rule, it is governed by the law of his nationality: and there is evidence before the English court that Italian courts would interpret this to mean English law, despite the fact that neither "British" law nor "English" nationality exists. The problem then is what meaning should be attached to the phrase "law of the domicile" in the English conflict rule: Does it mean the internal or domestic law of Italy, or does it mean Italian rules of the conflict of laws? If it means Italian rules of the conflict of laws, a similar problem arises as to the meaning of the phrase "law of the nationality" in the Italian conflict rule: Does it mean the internal or domestic law of England, or does it mean English rules of the conflict of laws? If it means English rules of the conflict of laws, a vicious circle is constituted, because the series of references between English and Italian law is (in theory) endless.

The problem was "discovered" in judicial decisions in England, Germany and France rendered, respectively, in 1841,[2] 1861[3] and 1878.[4] Until 1926 it was generally assumed that the vicious circle could be broken in one of two ways: either by confining the English reference to the domestic rules of the law of the domicile, or by accepting the reference from the conflict rules of the law of the domicile and applying English domestic law. The first method involves a refusal to mount the fascinating but fatal merry-go-round at all. The second method involves stopping the game of ping-pong with the return of the service. However, in a famous trilogy of English cases[5] decided between 1926 and 1930 a third solution was adopted, that of deciding the case as it would be decided by the foreign court. If the Italian court would refer to English law as the law of the nationality and would interpret its reference to mean English domestic law, then the English court will do likewise and apply English domestic law. But if the Italian court would interpret its reference to mean English rules of the conflict of laws and would accept the renvoi therefrom and apply Italian domestic law, then the English court will do likewise and apply Italian domestic law. What happens if the Italian court

[2] *Collier* v. *Rivaz* (1841), 2 Curt. 855.

[3] Decision of the Oberappellationsgericht of Lubeck, March 21st, 1861; Seufferts Archiv, t. 14, no. 107.

[4] *Affaire Forgo* (1878), Sirey 1, 429.

[5] *Re Annesley*, [1926] Ch. 692; *Re Ross*, [1930] 1 Ch. 377; *Re Askew*, [1930] 2 Ch. 259.

adopts the same laissez-faire attitude as the English court English judges have not yet had occasion to explain.

Although the "partial" or "single" type of renvoi to be found in continental decisions and codes had been the subject of a vast continental literature, the volume of material published in English was sparse when Falconbridge published his first article in 1930; and most of it was, for various reasons, misleading or out of date. Falconbridge was not the first writer to discuss the renvoi in the English language, but he was the first to analyse and explain that form of "total" or "double" renvoi which is now regarded as a peculiarly English variant of the doctrine. His work was therefore very much a pioneering effort, and it has since remained the starting point of all serious speculation on the subject.

Falconbridge was strongly critical of the English cases and subjected them to a devastating analysis which has never been answered, perhaps because it is unanswerable. His main conclusion was that "in view of the inherent inconsistencies of certain lines of reasoning, and of the strange results of the doctrine as applied to different sets of facts, the supposed authorities for the renvoi are, to say the least, singularly weak, and any advantages which it is supposed to possess either disappear on examination or are outweighed by its disadvantages".[6] He pointed out that all the English cases on renvoi are decisions of single judges sitting at first instance; and that, although the reasoning of the judges appears at first sight to present a coherent theory, in fact they adopt widely differing lines of reasoning, which would have led to different results had there been a slight change in the very special facts. There was therefore no justification for elevating the renvoi formula into a general rule of the conflict of laws.

Falconbridge subsequently relaxed his hostility to the renvoi doctrine to the extent of admitting that in certain exceptional cases the doctrine is a useful one and may promote a just solution. "It would appear", he wrote in 1939, "that the controversy has passed beyond the stage in which the doctrine can be either wholly rejected, or wholly accepted, on supposedly logical or other grounds".[7] In thus raising the controversy above the plane of formal logic on to the plane of utility, Falconbridge rescued this branch of the conflict of laws from the danger of becoming a mere battleground for theorists. By concentrating attention on the exceptional situations, he may perhaps have paved the way to uni-

[6] Essays (1st ed.) p. 111.

[7] Renvoi, Characterization and Acquired Rights (1939), 17 Can. Bar Rev. 369, at p. 370; reprinted as chapter 8 of the Essays (1st ed.).

versal agreement. Of course, opinions can and do differ about some of his exceptions, and his own views seem to have fluctuated on some of them. For instance, in the first edition of his *Essays*,[8] he throws out quite casually the suggestion that a marriage should be formally valid if it complies with the formalities prescribed by the *lex loci celebrationis* or recognized as valid by that law. The suggestion seems to be withdrawn in the second edition.[9] Yet the formal validity of marriage seems intrinsically likely to become a fruitful field for the application of the renvoi doctrine in the English conflict of laws. We have, first, a rigid English conflict rule insisting on compliance with the *lex loci celebrationis*; second, a more flexible conflict rule in neighbouring countries, allowing compliance with the personal law as an alternative to the *lex loci*; and, third, a strong judicial bias *in favorem matrimonii*. The formal validity of marriages bears a striking similarity to the formal validity of wills, which was the medium through which the doctrine of renvoi obtained a foothold in our law; yet we have plenty of cases on the latter and practically none on the former. However, a recent English case[10] does strongly suggest (without deciding the point) that a marriage of Polish nationals in Italy would be valid if celebrated in accordance with the formalities prescribed by Polish law, since Italian law allows foreigners in Italy to use their national form.

The exceptional situations in which the application of the renvoi doctrine may be justified receive less prominence in the second edition of the *Essays* than they did in the first edition. But this does not mean that Falconbridge's opposition to the renvoi has become more uncompromising. It is noteworthy that he condemns[11] the sweeping assertion in *Matter of Tallmadge*[12] that "the renvoi is no part of the law of New York" almost as roundly as he had previously condemned attempts to elevate the English cases into a general rule. His final position in the matter is well expressed in these words: "The doctrine of the renvoi ought not to be accepted in toto or rejected in toto. That is to say, the doctrine is a useful, even necessary, expedient or device in some situations and as regards some questions, but it should not be adopted as a general principle applicable to all situations and all questions".[13] These are words of wise and mature wisdom. To some

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[8] Essays (1st ed.) p. 182. [9] Essays (2nd ed.) pp. 164-165.
[10] *Holdowanski* v. *Holdowanska*, [1956] 3 W.L.R. 935.
[11] Essays (2nd ed.) p. 247. This chapter reproduces an article entitled The Renvoi in New York and Elsewhere (1953), 6 Vand. L. Rev. 708.
[12] (1919), 181 N.Y. Supp. 336. [13] Essays (2nd ed.) p. 141.

they may seem self-evident, almost platitudinous. This is not, however, my opinion, for I think that on such a controversial, not to say explosive, question as that of renvoi, it takes some courage to occupy that most dangerous of all positions—the middle of the road.

Falconbridge's views on renvoi have been largely accepted by leading English writers. Thus, the fifth edition of Dicey (published in 1931) contained an appendix, somewhat disorderly in its presentation, where the editor collected every authority, good, bad and indifferent, which could be cited in favour of the doctrine of the English courts, without any critical comment and apparently without any appreciation of the difficulties involved. On the other hand, the first edition of Cheshire (published in 1935) contained a scathing attack on the doctrine. Now the current editions of both textbooks, while strongly critical of the doctrine on theoretical and practical grounds, and using many arguments borrowed from Falconbridge, nevertheless admit the existence of exceptions.

I have now discussed Falconbridge's general views on renvoi as expressed in his various articles, now conveniently collected as chapters 6 to 10 inclusive of the second edition of his *Essays*. I cannot leave this subject without calling attention to his treatment of some phases of the doctrine, which seems to me to be a most helpful exposure of the difficulties inherent in the English doctrine, and at the same time a good example of his highly developed faculty for critical comment. I select for discussion (1) Falconbridge's remarks on the national law of a British subject, (2) his criticism of an unfortunate dictum in the Privy Council.

(1) As I have suggested,[14] it is hard to see how an Italian court could arrive at the conclusion that the personal law applicable to a British subject domiciled in Italy is English law, unless it makes the untenable assumptions that either "British" law or "English" nationality is a concept known to English law. Yet the Italian expert witness in *Re Ross*[15] stated that "the Italian Courts would determine the case on the footing that the English law applicable is that part of the law which would be applicable to an English national [*sic*] domiciled in England"; and the English judge accepted this evidence without demur. In *Re Askew*, the German expert witness stated, "I am informed and believe that John Bertram Askew was an Englishman. Therefore [*sic*] English law would be applied by the German court in deciding the question";[16] and the

[14] *Ante*, p. 611.
[15] [1930] 1 Ch. 377, at p. 404.
[16] [1930] 2 Ch. 259, at p. 276.

English judge accepted this evidence, although Askew was an Englishman only because his domicile of origin was English, whereas the German conflict rule referred to the "national law" of the *de cujus*. In *Re O'Keefe*, Crossman J. said: "Italian lawyers cannot say what is the meaning of the law of the nationality where there is more than one system of law of the nationality; but I have evidence, which I think is not disputed, from experts in Italian law that the Italian law would hold that the succession is regulated by the law of the country to which the intestate belonged, and belonged I think at the time of her death".[17] Oh this evidence, the judge reached the remarkable conclusion that the succession was governed by the law of Eire, a political unit which only came into existence during the long sojourn of the intestate in Italy, of which she was not a citizen by the law of Eire itself, and which she had never visited in her life except on a short tour with her father sixty years before her death.

It may be observed in passing that the English court's acceptance of this kind of evidence may be justifiable if the object is merely to discover *what* a foreign court would do in the circumstances, without regard to *why* it would do it. Still, conclusions based on such a manifestly false premise are likely to be misleading. The English cases are therefore likely to prove unsafe guides for future cases in which, it may be hoped, the expert witnesses will be adequately informed of the complexities of English legal institutions. Falconbridge performed a notable service in drawing attention to the possible ways in which an Italian court might be expected in the future to apply its nationality rule to the case of a British subject domiciled in Italy at the time of his death. This is what he says:[18]

> An Italian court might conceivably do any one of three things, namely: (1) It might apply domestic Italian law *qua lex fori* on the ground that the reference by the Italian conflict rule to the national law of the *de cujus* is meaningless or ineffective in the circumstances.
>
> (2) It might apply domestic Italian law *qua lex domicilii* on the theory that it is giving effect to a supposititious British conflict rule referring to the law of the domicile.
>
> (3) It might apply the domestic law of that part, if any, of the British Empire in which the *de cujus* had his domicile of origin.
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> Of these three possible solutions the first would seem to be the best. . . . It would appear that this solution is likely to prevail in Italy in the future, as Italian courts will be fully informed, by Italian writers

[17] [1940] Ch. 124, at p. 129.

[18] Essays (2nd ed.) p. 208; cited in full by Cook, Logical and Legal Bases of the Conflict of Laws (1942) pp. 241-242, where he describes it as a "helpful discussion".

> on the conflict of laws, of the impossibility of giving effect to a reference by an Italian conflict rule to the national law of a British subject who dies domiciled in Italy. The second solution is indefensible in so far as it is based on a supposititious but in fact non-existent British conflict rule. . . . The third solution is indefensible from any point of view.

(2) In *Kotia* v. *Nahas*,[19] the Privy Council, sitting on appeal from Palestine, had to construe a section of the Palestinian Succession Ordinance, 1923, which adopted a form of partial or single renvoi in a precisely-defined Palestinian situation. This form of renvoi is radically different both in its starting point and in its result from the form of double or total renvoi which has been adopted in England. It is different in its starting point because it does not inquire how a foreign court would decide the case or consider the possibility that the foreign court might "accept the renvoi" from the law of the forum. It is different in its result because, in cases where it applies, it always leads to the application of the domestic law of the forum and never to the application of foreign domestic law, as the English theory of renvoi sometimes does. In view of these fundamental differences between the two forms of renvoi, there was no occasion for the Privy Council to say anything about renvoi in English as opposed to Palestinian law. They should clearly have limited themselves to the construction of the Palestinian Ordinance and its application to the facts of the case before them. Instead, they seem to have forgotten that, though physically sitting in Downing Street, they were notionally sitting in the country from which the appeal was brought; and Clauson L.J. (who delivered the advice of the board) uttered the following sweeping dictum:

> . . . in the English courts phrases which refer to the national law of a propositus are prima facie to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant).

On this, Falconbridge makes the following comment:[20]

> There would seem to be two objections to the mode of reasoning of the learned lord justice. Firstly, it is not helpful, in construing a special statutory conflict rule of Palestine which provides for the acceptance of a reference back, to attempt to support a particular construction

[19] [1941] A.C. 403.

[20] Essays (2nd ed.) pp. 223-224.

> of that rule by an *obiter dictum* as to what an English court would do in the case of a reference to the law of a foreign country under an English conflict rule. Secondly, the *obiter dictum* as to what an English court would do is erroneous, because it appears on the face of the English decisions that an English court sometimes accepts the reference back and sometimes does not, after considering what particular theory of the renvoi prevails in the foreign law.
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> Furthermore it would appear that Clauson L.J. has allowed himself to slip into the error of imagining that the Privy Council is an English court, whereas in the case under discussion it was merely a Palestine court sitting in England. . . . in the conflict of laws it is important that a case be decided from the point of view of the forum, and it leads to confusion if the Privy Council on an appeal from a court in Palestine, that is, from a forum in which English law is a foreign law, seems to transfer the forum to England, with the necessary consequence that English law becomes the *lex fori* and the law of Palestine becomes a foreign law. . . . It is difficult to assign any intelligible meaning to the foregoing passage unless we suppose that Clauson L.J. imagines the Privy Council to be an English court engaged in the task of construing a conflict rule of a foreign law.

This is severe language, but (it is submitted) justifiable in the circumstances: and it is to be observed that Cheshire's criticism is even stronger.[21] Falconbridge goes on to point out that decisions of the Privy Council are not technically binding on English courts. It may perhaps be doubted, however, whether this rule holds good in the conflict of laws. Thus, on the question whether domicile or residence gives a court jurisdiction to grant a divorce, there is a conflict of authority between the decision of the Court of Appeal in *Niboyet* v. *Niboyet*,[22] holding that residence is sufficient, and the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier*,[23] holding that domicile is required. Yet, although *Niboyet* v. *Niboyet* has never been formally overruled,[24] English courts have assumed without hesitation that the *Le Mesurier* case is right and the *Niboyet* case is wrong. And, unfortunately, the English court in *Re Duke of Wellington*[25] based its conclusion mainly if not entirely on the Privy Council's dictum in *Kotia* v. *Nahas*.

III. *Characterization*

Like the problem of renvoi, to which it is closely related, the problem of characterization raises fundamental issues in the conflict of laws. It was discovered independently by the German jurist Kahn

[21] Private International Law (5th ed.) pp. 81-83.
[22] (1878), 4 P.D. 1 (C.A.). [23] [1895] A.C. 517.
[24] *Pace* the headnote-writer in *Salvesen (or Von Lorang)* v. *Administrator of Austrian Property*, [1927] A.C. 641 (a case of nullity).
[25] [1947] Ch. 506; affirmed on other grounds, [1948] Ch. 118 (C.A.).

in 1891[26] and by the French jurist Bartin in 1897,[27] and introduced to American lawyers by Lorenzen in 1920[28] and to English lawyers by Sir Eric Beckett in 1934.[29] Its general nature may be thus explained. Even if, by some miracle, all countries in the world adopted the same formulation of the same conflict rules, it would still not follow that the same case would be decided in the same way irrespective of the country in which it was litigated. This is because, lying hidden beneath the identical formulation of the conflict rules, there would still remain differences of view as to the categories which those rules were intended to cover. For instance, suppose that a Frenchman under the age of twenty-one marries a Frenchwoman in England without having obtained the consent of his parents as required by French law. If English law governs the validity of this marriage, it is valid; if French law governs, it is invalid. The English and French conflict rules agree that the formalities of marriage are governed by the law of the place of celebration (English law) and also that capacity to marry is governed by the personal law (French law). But which law, French or English, determines whether the requirement of parental consent relates to formalities or to capacity?

In order to appreciate Falconbridge's contribution to this problem, it is necessary to examine the solutions which had been advanced by writers at the time when he wrote his first article on the subject in 1937. Three such solutions had been advanced, which may conveniently be called the *lex fori* theory, the *lex causae* theory, and the theory of analytical jurisprudence and comparative law.[30] The first theory, adopted by the great majority of continental writers, is that the process of characterization should be performed in accordance with the domestic law of the forum. If the forum has to characterize a rule or institution of foreign law, it should inquire how the corresponding or most closely analogous rule or institution of its own law is characterized, and apply that characterization to the foreign institution or rule. The second theory, adopted by a few continental writers, is that the process of characterization should be performed in accordance with the appropriate foreign law, and that every rule of law should derive its characterization from the legal system to which it belongs. The third theory is that the process of characterization should be per-

[26] (1891), 30 Jhering's Jahrbücher 1. [27] (1897) Clunet 225.
[28] (1920), 20 Col. L. Rev. 247; reprinted as chapter 4 of Lorenzen, Selected Articles on the Conflict of Laws (1947).
[29] (1934), 15 Brit. Y.B. Int'l L. 46.
[30] See Dicey, Conflict of Laws (6th ed.) pp. 66-68.

formed in accordance with analytical jurisprudence, "that general science of law, based on the results of the study of comparative law, which extracts from this study essential general principles of professedly universal application".[31]

Formidable objections can be and have been urged against each of these theories. The main objections to the first theory are that it is arbitrary and mechanical in its operation; that it may result in the forum refusing to apply a foreign law in cases where according to that law it is applicable, or in the forum applying a foreign law in cases where according to that law it is not applicable; and that it breaks down altogether when there is no rule or institution of the forum which is closely analogous to the foreign institution or rule. These objections are hardly met by restating the *lex fori* theory in the terms that the forum should characterize in accordance, not with the domestic rule, but with the conflict rule of its own law: for it is obvious that any court must begin by applying its own conflict rules, and the question under discussion is what those rules are. The objections to the second theory are that if the forum were to refer the whole problem of characterization to the foreign law, it would lose all control and cease to be master in its own house. Moreover, the forum may not know which is the relevant foreign law until the process of characterization is complete: obviously it is arguing in a circle to say that the foreign law should govern the process of characterization before the process of characterization has led to the selection of the appropriate foreign law. The third theory is superficially attractive, because it is a kind of compromise between the other two and is far less mechanical than either. But the objections to it are that it is impractical, because the study of comparative law can reveal differences between domestic laws but hardly resolve them, and because there are very few "general principles of universal application" and very little measure of agreement as to what those principles are. Moreover, in Falconbridge's words, it "would seem to require a supranational class of judges, deeply learned in comparative law, capable of dissociating problems before them from the law of the forum, and willing to adopt in conflict problems a technique which is entirely foreign to the technique applied by them to other problems".[32]

This, then, was the state of the poll when Falconbridge wrote the first of his four articles on characterization in 1937.[33] It was a

[31] Beckett, (1934), 15 Brit. Y.B. Int'l L. 46, at p. 59.
[32] Essays (1st ed.) p. 46.
[33] Characterization in the Conflict of Laws (1937), 53 L. Q. Rev. 235,

prospect sufficient to daunt the stoutest heart. Three theories, which seemed to cover all the ground, had been discussed exhaustively, not to say exhaustingly, by continental writers. Only two writers had written on the subject in English.[34] English and American textwriters had left it severely alone. But Falconbridge was not daunted. He propounded a view which he described as "a *via media* between characterization by the *lex fori* and characterization by the *lex causae*".[35] This view is, briefly, that the forum should look before it leaps, and engage in a process of tentative or provisional characterization before finally selecting the proper law. In the marriage case stated earlier, for example, the forum should examine the provisions of the law of the place of celebration in their context in that law in order to ascertain whether they relate to formalities and may therefore affect the formal validity of the marriage, disregarding provisions of that law which relate to capacity to marry. The forum should then examine the provisions of the law of the domicile of the parties in their context in that law in order to ascertain whether they relate to capacity to marry, disregarding provisions of that law which relate to formalities.

This theory of a provisional characterization of rules of law in their context is a flexible one, and seems likely to achieve less arbitrary results than would a mechanical process of characterizing in accordance with either the *lex fori* or the *lex causae*. It is also a great deal more practical, and therefore more likely to be of use to a court, than the process of characterizing in accordance with analytical jursprudence or comparative law.

Falconbridge devoted some attention to a question often overlooked by other writers, namely, what exactly is it which is the subject-matter of the process of characterization? What is it which is characterized? He insists (and in my opinion rightly) that the subject of characterization is legal and not factual. We do not, for instance, characterize the question of parental consents to marriage in the abstract, but rather the question of parental consents in relation to a particular rule of law, English or foreign, which makes them requisite to the validity of a marriage. If this were not so, some strange and arbitrary results would follow. Eng-

537. His later articles are: Conflict of Laws: Examples of Characterization (1937), 15 Can. Bar Rev. 215; Renvoi, Characterization and Acquired Rights (1939), 17 Can. Bar Rev. 369; Conflict Rule and Characterization of Question (1952), 30 Can. Bar Rev. 103, 264. All these articles are now reproduced or summarized in chapters 3 to 5 inclusive of the Essays (2nd ed.).

[34] See footnotes 28 and 29 *ante*. [35] Essays (2nd ed.) p. 59.

lish law, having once characterized as a formality the parental consents required by English domestic law, would be bound by precedent to characterize as a formality the parental consents required by foreign law, however different the foreign rule might be from the English rule in wording, context and effect. "A requirement as to parental consent", says Falconbridge, "cannot be characterized in the abstract and for all cases either as a matter of formalities of celebration or as a matter of capacity to marry, but . . . in the law of one country it may by its terms and in the light of its context in that law be a matter of capacity, and in the law of another country it may by its terms and in the light of its context in that law be a matter of formalities".[36] With engaging candour, he tells us that some of his views on this question were described by the Italian jurist Cansacchi as "absurd".[37] In a dignified rejoinder, Falconbridge says he is unable to see any absurdity in saying that requirements of parental consent in two different laws may be so different in nature that they may fall within the terms of different conflict rules. I respectfully agree with him.

Cansacchi's own theory of characterization is based upon a distinction between primary and secondary characterization, similar to the one propounded by Robertson in his monograph[38] and by Cheshire in the second and third editions of his *Private International Law*. In the first edition of his *Essays*, Falconbridge devoted some space to a criticism of this distinction.[39] His main grounds of criticism were: (1) that writers were not even approximately agreed on what for them was the crucial point in the theory, namely, where the line is to be drawn between primary characterization (governed by the *lex fori*) and secondary characterization (governed by the *lex causae*); and (2) that a writer could, without perceiving any inconsistency, advocate the rejection of the renvoi doctrine and yet advocate secondary characterization by the *lex causae* (a process which, as Falconbridge pointed out, is justifiable only in those exceptional cases in which the forum is willing to apply the doctrine of renvoi). The theory of primary and secondary characterization was also criticized in the sixth edition of Dicey[40] and has now been abandoned by Cheshire. It therefore receives less prominence in the second edition of Falconbridge's *Essays*.

Perhaps even more important than Falconbridge's theory of

[36] *Ibid.*, p. 76.
[37] *Ibid.*, pp. 84-86.
[38] Characterization in the Conflict of Laws (1940).
[39] Pp. 98-101, 107-108, 161-164.
[40] Pp. 68-70.

characterization (important as that undoubtedly is) is his analysis of the successive stages which should be followed in any complicated case in the conflict of laws. These are as follows:[41] (1) Characterization: the forum should first characterize, or define the nature of, the legal question or questions involved in the factual situation; (2) Selection of the connecting factor: the forum, having defined the question before it by the process of characterization, should next select the connecting factor which is the most significant one with reference to the question so characterized at stage one—for example, the law of the domicile of the parties, the law of the place where land is situated; (3) Application of the proper law: the forum should finally apply the selected proper law to the factual situation, that is, determine how much of the foreign law ought to be applied. This helpful analysis, first propounded in 1937 and now slightly refined and modified, has been widely accepted by other writers.[42] There is no longer any excuse for a court getting into such a muddle, or producing such bizarre and antisocial results, as the English Court of Appeal did in *Ogden* v. *Odgen*.[43]

I make no apology for dwelling, at what may seem disproportionate length, on Falconbridge's contributions to these difficult problems of renvoi and characterization. His discussion of them occupies over one quarter of his book, and I have no doubt that he regards them as of cardinal importance. I believe that, when a proper historical judgment can be made and Falconbridge's contribution to the conflict of laws can be viewed in proper perspective, it will be found that in these subjects he has made his most abiding mark. He is interested in fundamentals; and it is significant that his last two published articles, like his first two, were on renvoi and characterization. His later articles disclose a deep knowledge of what has been written, not only by English and American, but also by French, German, Swiss and Italian writers. I record my humble but profound conviction that, so far as my own researches go, no one has written on renvoi and characterization more helpfully, or with deeper insight or greater common sense, than has Falconbridge. This opinion is shared by the post-graduate writers of doctorate theses in the conflict of laws whom in the course of my work I have had occasion to supervise or examine.

[41] Essays (1st ed.) pp. 35-39, 159-161; (2nd ed.) pp. 50-53.

[42] *E.g.* Cheshire, Private International Law (5th ed.) pp. 45-46; Dicey, Conflict of Laws (6th ed.) p. 64; Robertson, Characterization in the Conflict of Laws (1940) p. 9; Lorenzen, Selected Articles on the Conflict of Laws (1947) pp. 115-116.

[43] [1908] P. 46 (C.A.).

None of them can resist the temptation to have a go at these difficult subjects at some stage in their thesis; all of them conclude that Falconbridge's views are the most helpful.

IV. *Lord Kingsdown's Act*

I turn to a topic of much less abstruseness, to which Falconbridge's contribution can be easily demonstrated. This is the redraft of Lord Kingsdown's Act by the Conference of Commissioners on Uniformity of Legislation in Canada, of which he was secretary from its formation in 1919 until 1930, and then president until 1933.

In the first half of the nineteenth century, English courts laid down the somewhat rigid rule that the formal validity of a will depended on the law of the testator's domicile at the time of his death. This rule meant that a will might become formally invalid, without the testator's knowledge, if he changed his domicile after making it. What was worse, it also meant that a man might be unable to make a will at all if he was stricken with a mortal illness in some foreign country where no local lawyer could be found who was familiar with the formalities necessary for will-making by the law of the domicile. This insistence on one form and one form only for wills produced two evil consequences in the English conflict of laws. One was the doctrine of renvoi, which, as we have seen,[44] obtained a footing in our law through the medium of cases on the formality of wills. The other was Lord Kingsdown's Act, 1861, which was a well-meaning but amateur attempt by Parliament to modify the English conflict rule by allowing testators a greater latitude of choice.

It is obvious now what this statute ought to have provided. It ought to have provided in general terms that any will of movables should be formally valid if it complied with the formalities prescribed by the law of the place of execution, or by the law of the testator's domicile at the date of execution, or (perhaps) by the law of his domicile of origin, in addition to the law of his domicile at the time of his death. Unfortunately, the statute is very badly drafted, and many harsh things have been said about it. These may be summarized as follows: (1) the first two sections are unnecessarily restricted to the wills of British subjects, though the evil which the legislature set out to cure is by no means confined to them; (2) the third section on the other hand appears, on a literal reading, to apply to the wills of all testators in the world, irrespec-

[44] *Ante*, p. 613.

tive of their nationality or domicile; (3) the first two sections refer to wills of personal estate, which is a bad blunder and has had the effect of introducing an unnecessarily incongruous exception to the principle that rights over land are governed by the *lex situs*: "movables" is obviously what was intended; (4) there seems no conceivable reason to differentiate, as do sections 1 and 2, between wills made inside and outside the United Kingdom, or to allow a wider choice of forms for the latter than for the former.

Variants of Lord Kingsdown's Act were adopted or enacted in most of the provinces of Canada, differing little or not at all from their prototype except for the substitution of "this province" for "the United Kingdom". In 1929 an improved version,[45] substituting "movables" for "personal estate", was prepared by the Conference of Commissioners on Uniformity of Legislation in Canada, and subsequently adopted in Saskatchewan (1931) and Manitoba (1936). Falconbridge was primarily responsible for this redraft, but he was not satisfied with it, and in 1946 he submitted a revised version,[46] which was adopted in New Brunswick in 1950. This revised version was itself revised in 1953 by the Conference of Commissioners on Uniformity of Legislation,[47] and is a notable improvement on all previous efforts, including of course the original United Kingdom statute. It has since been adopted in Ontario (1954), Manitoba (1955) and Newfoundland (1955), and, as Falconbridge says, when it is enacted by the legislatures of the other common-law provinces of Canada, the result will be a notable improvement and clarification of the rules of the conflict of laws on succession in those provinces. It must be a satisfaction to him to know that his prolonged efforts in this matter have been crowned with success.

A similar reform in England is long overdue. Reform would be easy, because we have the Canadian experience on which to draw, and because we have a Private International Law Committee specially charged with the task of suggesting amendments to the English rules of the conflict of laws. But so far the joint efforts of Falconbridge and myself have not been successful in inducing the English authorities to refer this matter to the committee.

V. *Essays on the Conflict of Laws*

Falconbridge's fame as a profound and original writer on the conflict of laws would have been secure if he had made no contribu-

[45] Printed in Essays (2nd ed.) p. 547.
[46] *Ibid.*, p. 549.
[47] *Ibid.*, p. xxxii.

tions to the subject except his articles on renvoi and characterization which have already been discussed. In fact, however, between 1928 and 1953 he has written no less than twenty major articles on the conflict of laws and some thirty comments on recent cases. Most of these articles and comments were originally published in this Review. Some of them have been translated into French and Italian. All are reproduced, in one form or another, in his *Essays on the Conflict of Laws*, the first edition of which was published in 1947 and the second in 1954. Of course some of them had to be thoroughly revised to make them suitable for publication in this more permanent form, and much careful work was necessary by way of re-arrangement and deletion of overlapping passages in order to prevent repetition and to present a connected treatise. But it is astonishing that so much could be republished in the form in which it was first written. It is equally remarkable that the articles and case comments, supplemented as they are by some new chapters of great interest and by "Supplementary Observations", should cover so many of the topics usually discussed in textbooks on the conflict of laws.

Reviewing the first edition of the *Essays* in 1948 I wrote: "Dean Falconbridge's writings during the last twenty years have elevated him to a unique position of authority in the common law world as a specialist in the Conflict of Laws. The news that he intended to collect these scattered writings into a single volume was therefore received with the liveliest satisfaction. The resulting volume is a fascinating treasure-house of wisdom, learning and acute thinking."[48] Reviewing the second edition in 1954 I wrote: "Here is a book from which more can be learnt of the fundamental problems of the Conflict of Laws than from any other book of similar size in the English language".[49]

Space is lacking here to discuss each of the forty-seven chapters of the *Essays* with the same detail as I have already discussed the chapters on characterization and renvoi. But perhaps I may single out for special mention the excellent chapters on the Meaning of a Conflict Rule; International and Intranational Cases; Limitation of Actions and Prescription; Substance and Procedure; Bills and Notes; the Transfer of Chattels; the Transfer of Intangible Things; Annulment Jurisdiction and Law; Succession by Legitimate, Legitimated and Adopted Children; and Torts. On each of these topics, Falconbridge has made valuable and original contributions.

[48] (1948), 7 U. of Toronto L.J. 526. [49] (1954), 32 Can. Bar Rev. 457.

Many of the cases which he discusses so entertainingly were somewhat ill-considered and have been strongly criticized by other writers. Falconbridge can criticize a case as devastatingly as anyone, as witness his remarks on the two renvoi cases, *Re O'Keefe*[50] and *Kotia* v. *Nahas*.[51] But it is observable that he never criticizes a case unless he is convinced that either the reasoning or the result is unsupportable; and often he is able to suggest alternative lines of reasoning on which the result might been been reached. This gives his criticisms a measured force which makes them all the more convincing. His approach to the problems of the conflict of laws is always a practical, down-to-earth approach. Although deeply interested in fundamentals, he will have no truck with theories, however fascinating, unless they provide a solid basis for the decision of concrete cases. Though his observations on the more abstruse and theoretical phases of the subject are as acute as anyone's, he never loses sight of the fact that the conflict of laws is, after all, an instrument for the solution of questions that actually come before courts. His discussion is therefore as helpful to the practising lawyer or the judge as it is stimulating to academic lawyers. An American writer recently described the realm of the conflict of laws, no doubt with a certain degree of conscious hyperbole, as "a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon".[52] This is a reproach which no one can honestly level at Falconbridge's *Essays on the Conflict of Laws*.

Falconbridge's book has been freely cited by Canadian judges,[53] one of whom described him as "a recognised authority".[54] It is not, perhaps, so well known to English judges as it deserves to be. This is no doubt due to the fondness of English lawyers for the easily-quoted black-letter propositions of Dicey. But there are welcome signs that Dicey's former monopoly is breaking down. I recently heard Lord Simonds say to counsel, during the argument of an appeal in the House of Lords, "Dicey is not the only book on the conflict of laws. What does Cheshire say?" It is much to be hoped that this spirit of inquiry will in due course extend to

[50] [1940] Ch. 124; discussed in the Essays (2nd ed.) pp. 212-215.
[51] [1941] A.C. 403 (P.C.); discussed in the Essays (2nd ed.) pp. 220-227.
[52] Prosser (1953), 51 Mich. L. Rev. 959, at p. 971.
[53] See, *e.g.*, *Spencer* v. *Ladd*, [1948] 1 D.L.R. 39, at pp. 43, 44 (Alta.); *Re Brookfield*, [1948] 4 D.L.R. 210, at pp. 216-217 (N.S.); *McGuigan* v. *McGuigan*, [1954] 3 D.L.R. 127, at p. 130 (Ont.); *Felton* v. *Ranaghan*, [1955] 3 D.L.R. 526, at p. 530 (Sask.); *Solomon* v. *Walters* (1956), 3 D.L.R. (2d.) 78, at pp. 79, 80 (B.C.).
[54] *McGuigan* v. *McGuigan*, [1954] 3 D.L.R. 127, at p. 130 *per* Wilson J.

Falconbridge's *Essays*, from which so much can be learnt about helpful techniques in the conflict of laws. There is no excuse for English lawyers to remain in ignorance of Falconbridge's work, for there are numerous references to the *Essays* in almost every chapter of Dicey.

The intricate problems of the conflict of laws have had their fascination for some very distinguished legal writers. In the English-speaking world and beyond, Falconbridge's fame is secure, and he will surely rank as an equal of Story, Westlake, Dicey, Beale, Lorenzen and Cook. I am privileged to have this opportunity of paying my respects to one who is held in such deservedly high esteem, and to whom I personally owe so much.